WEE WOOD INDUSTRIES SDN. BHD.

v.

GUANNEX LEASING SDN. BHD.

HIGH COURT MALAYA, ALOR SETAR

KC VOHRAH J

[CIVIL SUIT NO. 427/85]

12 SEPTEMBER 1990

CONTRACT: *Lease of chattels - Bailment - Construction of terms in agreement - Whether harsh and unconscionable - No statutory restrictions on leasing agreements for chattels - Agreed loss value - Sections 75, 101 Contracts Act 1950 - Section 75 Evidence Act 1950.*

On 23 May 1984, the plaintiff W and the defendant G entered into a leasing agreement in relation to several items of equipment for 36 months. After a few payments of rental, W defaulted in further payments. W now seeks certain declarations, injunction and damages; G counterclaims for damages.

The issues for determination were,

(i) whether Article 17(1)(b) of the agreement, which provided for repossession of items by G under the lease without the need by the lessor to give any prior notice or demand was harsh and unconscionable and

(ii) whether the term in relation to the charging of interest at 0.1% per day on overdue rentals was enforceable.

Held:

[1] In this agreement no option was given to the bailee to purchase the chattels and the bailee was obliged to return the goods when the contract came to an end; this lease agreement is therefore outside the purview of the Hire Purchase Act 1967.

[2] a)Save for the general provisions of the Contracts Act, there is no legislation controlling what may and may not be put in as contractual terms in leasing agreements of chattels (which is a contract of bailment); therefore there are no statutory restrictions on the right of the bailor to repossess the chattels pursuant to a provision of the agreement or upon termination of the lease.

(b) There has not been any reasoning or authority advanced by W to show that "equity" prohibits what the parties had willingly agreed to abide by, the terms of which do not contravene any legislation or public policy.

[3] Counsel for W did not advance any argument to support its allegation that the daily interest chargeable was in the nature of a moneylending transaction within the meaning of the Moneylenders Act 1951.

[4] On the facts and evidence Article 17(1)(c) (agreed loss value) comes into operation and the defendant is entitled to claim for loss.

[5] Based on s. 75 of the Contracts Act and s. 75 of the Evidence Act, following Lord Atkin's statement in *Bhai Panna Singh v. Bhai Arjun Singh*, a party cannot recover simpliciter the sum fixed in the contract whether as penalty or liquidated damages; the relevant party must prove the damages they have suffered.

[6] The amount of damages claimed by the defendant which included the economic loss of all the equipment at the purchase plus loss of rentals, profits and interest on the lease is reasonable.

[7] There was no evidence to show how the interest of 0.1% per day from May 1984 to date of realisation was arrived at; this claim was disallowed.

[Plaintiff's claim dismissed. Defendant's counterclaim allowed]

Cases referred to:
Maniam v. The State of Perak [1957] MLJ 75
Wearne Brothers (M) Ltd. v. Jackson [1966] 2 MLJ 155
Bhai Panna Singh v. Bhai Arjun Singh Air [1929] PC 779

Legislation referred to:
Contracts Act 1950, ss. 75, 101
Evidence Act 1950, s. 75
Contract Act [Ind], ss. 74, 79

For the plaintiff - Darshan Singh; M/s. Darshan Singh & Co.
For the defendant - Lee Lim Huat & Pathmanathan; M/s. Yusuf, Lee, Pathma & Marbeck

JUDGMENT

KC Vohrah J:

The plaintiff prayed for certain declarations, an injunction and damages in relation to a lease agreement for chattels. It was alleged that the defendant threatened to repossess items of equipment leased under it for failure on the part of the plaintiff to pay rentals for their use. The defendant counterclaimed for damages under it.

The plaintiff and the defendant entered into an agreement on 23 May 1984 where the defendant leased to the plaintiff several items of equipment at a rental of RM5,186 per month for 36 months after the plaintiff had made a deposit under the agreement. It was admitted by PW1, a director of the plaintiff, that after a few payments of rental the plaintiff then defaulted in further payments. PW1 said that the plaintiff made 4 payments but the evidence of DW2, the executive director of the defendant, showed, and this is more probable as her evidence was more cogent, that only 2 payments in respect of the first and second rentals were made by the plaintiff.

Article 17(1)(b) of the agreement provides, *inter alia*, that in the event the lessee (the plaintiff) fails to pay the rent provided in the agreement, the lessor (the defendant) has the right forthwith, without giving any prior notice or demand, to take possession of all the items of equipment under lease. The plaintiff alleged in its statement of claim that the defendant was threatening to exercise its right under this provision and it prayed for a declaration that the provision is unenforceable on the ground it is harsh and unconscionable and for which a Court of equity will give relief. The plaintiff also prayed for an injunction to restrain the defendants from repossessing the said equipment.

The plaintiff in addition complained that one of the terms of the agreement provides that interest of 0.1% per day shall be chargeable on overdue rentals and that it is in the nature of a moneylending transaction and it prayed for a declaration that this term is unenforceable.

I now come to the plaintiff's prayer for a declaration that Article 17(b) of the agreement is unenforceable. The agreement of 23 May 1989 between the parties is a leasing agreement of chattels. It is a contract of bailment, see s. 101 of the Contracts Act 1950 (Revised 1974) where the bailor, the defendant, agreed to lease out certain items of equipment to the lessee, the plaintiff, on certain terms and condition contained in the agreement. In the agreement no option was given to the bailee to purchase the chattels. It is clear that under the agreement that the bailee was obliged to return the goods when the contract came to an end. The lease agreement is therefore outside the purview of the Hire Purchase Act 1967 (Revised 1981). Save for the general provisions of the Contracts Act 1950 there is no legislation controlling what may and may not be put in as contractual terms in leasing agreements of chattels. There are, thus, no statutory restrictions on the right of the bailor to repossess the chattels pursuant to a provision of the agreement or upon termination of the lease. There is no legislative bar to having Article 17(1)(b) of the agreement providing for the defendant or lessor to have the right forthwith without giving any prior notice or demand to take possession of the chattels under lease in the event the lessee (the plaintiff) fails to pay the

rent. I do not see - and Counsel for the plaintiff has not advanced any reasoning or authority at all to show that - that "equity" prohibits what the parties had willingly agreed to abide by, the terms of which do not contravene any legislation or public policy. There is no merit in the plaintiff claiming for the declaration that Article 17(1)(b) of the agreement is unenforceable. In any event the prayer prayed for is academic as the PW1 admitted in evidence that most of the items of equipment under the lease have been disposed off by it to a third party. Thus, too, the prayer for the injunction did not arise.

As for the prayer for a declaration that the clause in the agreement providing for interest at 0.1% per day on overdue rentals is unenforceable, I again could see no merit in the argument that it is unconscionable and harsh based on the ground contained on the averment that the interest: "is in the nature of moneylending transaction for which a Court of equity would give relief". Save for this averment nothing was adduced in evidence towards making out the averment and Counsel for the plaintiff did not advance any argument showing that it is in the nature of a moneylending transaction within the meaning of the Moneylenders Act 1951 (Reprint 1981)

As for the plaintiff's claim for damages not an iota of evidence was adduced to show that he had suffered loss. In fact the evidence shows that not only did the plaintiff default in the other rentals, the plaintiff also sold most of the items of equipment though it had no title to them.

There is absolutely no merit in the plaintiff's case and its case had to be dismissed.

I now turn to the defendant's counterclaim. The evidence which I had accepted as probable (as earlier stated) was that the plaintiff only paid the first and second rental amounts (due in May and June 1984) under the lease agreement and then it defaulted in the other 34 payments. It has to be remembered that the plaintiff although having no title to the chattels under the lease had disposed almost all of the chattels to third parties. The defendant did not receive a single item back. The defendant, *inter alia*, claimed for the sum of RM185,013.90 being the "Agreed Lose Value" together with 0.15% interest per day on the amount till date of realisation.

It is necessary to turn to Article 17(1) of the agreement, this time to para. (c) thereof, which allows the defendant:

> to terminate the lease hereby created and to demand from the lessee the full amount of the agreed lose value and in addition thereto to claim from the lessee for compensation for all loss in damages including but not limited to loss of profits.

The reference to agreed loss value is a reference to item 9 in the schedule to the agreement where the agreed loss value in respect of the third month for the equipment is RM185,013.90.

It is pleaded in paras. 14 and 15 of the counterclaim that on 20 December 1984 the defendant sent a letter demanding payment of arrears of rental from July to November 1984 to no avail. There is no specific denial of all these. The evidence is certainly clear that no payment other than for the first two rentals were made. The defendant also pleaded in para. 17 that another letter dated 18 March 1985 accepting the plaintiff's repudiation of the lease agreement and terminating it with immediate effect was sent to the plaintiff. The plaintiff in its defence to the counterclaim did not deny receiving the letter but denied repudiating the agreement. In his evidence PW1 denied receiving the said letter but his denial is highly improbable. In any event the plaintiff is bound by its pleadings - it did not specifically deny receiving the letter terminating the agreement. To my mind Article 17(1)(c) - earlier adverted to - comes into operation and the defendant is entitled to claim for loss.

The defendant also raised the issue of misrepresentation on the part of the plaintiff in that it fraudulently induced the defendant to enter into the lease agreement by making certain representations which were false. Bearing in mind the concession of the defendant that ground is weak, I disregarded the counterclaim based on misrepresentation.

The question is - What is the measure of damages? As earlier stated, Article 17(1)(c) refers to the expression "Agreed Loss Value". This expression gets in meaning from Article 13(3) which, *inter alia*, reads, in the event the whole of the equipment is lost and/or rendered useless (including but not limited to damage incapable of economic repair and infringement of ownership) for any reason whatsoever the lessee shall pay to the lessor forthwith on demand the agreed loss value described in item 0 of the schedule. The agreed loss value of the various items of equipment when the third month a rental is not paid is provided in item 9 in the schedule to the agreement and this is shown as RM185,013.90. In respect of a stipulation of damages, s. 75 of the Contracts Act 1950 has this to say:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

As was stated by Thomson J (as he then was) in *Maniam v. The State of Perak* [1957] MLJ 75 at p. 76 and re-iterated by Abdul Aziz J (as he then was) in *Wearne Brothers (M) Ltd. v. Jackson* [1966] 2 MLJ 155 at p. 156, in this country with s. 75 of the Evidence Act 1950 there is no difference between liquidated damages and penalty.

In both cases the Privy Council case of *Bhai Panna Singh v. Bhai Arjun Singh* AIR [1929] PC 779 which dealt with corresponding s. 79 of the Indians Contract Act was cited with approval. To that Indian case at p. 180 Lord Atkins giving the advice of the Privy Council stated that s. 76 of the Indian Contract Act is to disentitle the plaintiff to recover **simpliciter** the sum fixed to the contract whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered. Now, in the schedule to the agreement there appears a list (see also second paragraph of preamble to agreement, article I and item I which makes reference to the attached list in the schedule) describing the items of equipment delivered to the plaintiff by the defendant. The list authenticated by the plaintiff through it managing director shows the total cost of all the items as RM179,489; that is to say, the defendant had brought all the items for that price before delivery to the plaintiff under the agreement. The value of these items let out on a business transaction must have taken into account profit, interest on money paid out for the purchase of the chattels for 36 months and risk of economic loss of all the equipment. DW1 agreed with plaintiff's Counsel that the sum the defendant claimed for included loss of the profit, interest and damages; she also added it includes "opportunity loss".

The evidence showed that the lease was for 36 months and that the plaintiff defaulted in all but two rental payments. Not a single item of equipment was returned to the defendant and they all had cost the defendant RM179,480 to purchase. The claim of the defendant for RM185,013.90 for default in the third payment appears reasonable considering the difference between this amount and the purchase value of all items of equipment at RM179,480 is only RM5,553.90. In other words the sum of RM185,013.90 claimed by the defendant which included the economic loss all the equipment at the purchase price of RM179,480 plus loss of rentals, profits and interest on the lease at RM5,553.90 appeared to me to be reasonable. I therefore gave judgment to the defendant on its counterclaim for RM185,013.90.

As for the claim of interest of 0.1% per day on this sum from May 1984 to date of realisation I had no evidence as to how this was arrived at by the defendant save for Article 18 of the agreement which provides for interest of 0.1% per day on overdue payments from the date it was due to the date of realisation. No evidence was shown to me that additional damages were due amounting to 0.1% per day on the sum and I disallowed this claim.

The nett result is that I dismissed the plaintiff's claim and allowed the defendant's counterclaim of RM185,013.90. I gave costs to the defendant.

Also found at [1990] 2 CLJ 1060